In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 707

CRESCENZIO RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1966. The petition for a writ of certiorari was filed on October 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner should have been granted a mistrial because of certain comments made by the prosecutor in his opening statement and closing argument.

268-470—66——1

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Northern District of Illinois on two counts of concealing and facilitating the transportation of heroin in violation of 21 U.S.C. 174, and in aiding the commission of a similar offense by his co-defendant Gutirrez. On February 18, 1966, petitioner was sentenced to imprisonment for ten years on each count, the sentences to run concurrently. The court of appeals affirmed the conviction.

1. The evidence showed that on June 30, 1965, at about 8:00 or 8:15 p.m., three police officers and federal narcotics agent Coulter, driving in an unmarked squad car, saw a man and a woman in a parked Buick. After the officers had conversed with the occupants, two of them concealed themselves in the back seat of the automobile. The other officer and agent Coulter parked their squad car some distance away. An officer testified that they were waiting for the arrival of a 1965 green Chrysler (Tr. 12–15).[1] At about 8:25 p.m., a 1965 green Chrysler, driven by petitioner with Gutirrez as a passenger, stopped beside the Buick. After a few seconds, it sped rapidly away around a corner (Tr. 16, 62–63). The squad car immediately followed in pursuit. The Chrysler stopped momentarily, after turning the corner. Gutirrez jumped out, threw a shiny package to the pavement, and began to run. Agent Coulter left his car, retrieved the package, and apprehended Gutirrez not far away (Tr. 65–66). After he turned Gutirrez over to two of the

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk of the Court.

officers, Coulter proceeded to where the third officer had succeeded in curbing the Chrysler, with petitioner still in the driver's seat (Tr. 66–67). The officer told Coulter that he had seen petitioner start to "reach in under the front seat" (Tr. 22) before petitioner was ordered to get out of the car, and that he therefore suspected there must be something hidden there. Coulter lifted the floor mat and found a second package of heroin approximately six inches from the driver's seat (Tr. 69–70). A few minutes later the other two officers arrived with Gutirrez, who stated that he was the owner of both packages of heroin (Tr. 72, 128), and that petitioner had no knowledge of his possession of the narcotics (Tr. 131–132).

Gutirrez testified that he was an addict (Tr. 124), that the packages of heroin were his, and that he had thrown one of the packages back into the automobile driven by petitioner, surmising that it landed "somewhere around his [petitioner's] feet" (Tr. 145–146). At the close of trial, he changed his plea to guilty.

2. In his opening statement the prosecutor referred to agent Coulter and another officer as "men [of] long experience in the fight against the narcotics traffic" (Tr. 4). An objection to the comment as argumentative was overruled (*ibid*). The prosecutor continued, saying:

> * * * They were engaged in the course of investigation on June 30, 1965; that after receiving certain information they were parked in the vicinity of Cullerton and Woods Street in Chicago, Illinois; that two other police officers * * * had concealed themselves in the

> back seat of an automobile parked in that vicinity, occupied by two known narcotic addicts;
>
> That the defendants, Crescenzio Ramirez, driving a 1965 Chrysler automobile, and accompanied by the defendant Gutirrez, drove up to that parked vehicle containing the two addicts and two police officers, stopped the car, the Chrysler——

At this point defense counsel moved for a mistrial; the motion was denied (Tr. 5).

In his summation to the jury the prosecutor said (Tr. 161):

> Now I submit, ladies and gentlemen, that they told you that they approached that parked '57 Buick with the two persons in it, that the defendant Ramirez and the defendant Gutirrez were ready to make a sale, if possible; that when they saw the police officers——

The defense again moved for a mistrial; that motion was also denied (Tr. 161).

ARGUMENT

Petitioner urges that three statements of the prosecutor—that the investigating officers were "men [of] long experience in the fight against the narcotics traffic," that the occupants of the parked vehicle were "known narcotics addicts," and that petitioner and his co-defendant Gutirrez "were ready to make a sale, if possible"—constitute error warranting review by this Court.

The court of appeals held that the prosecutor's comment that petitioner and Gutirrez were ready to make a sale was a "permissible interpretation by counsel from the testimony that was properly before

the jury" (Pet. App. 3). The evidence showed that the officers knew someone in a green 1965 Chrysler would meet the persons waiting in the parked Buick. Petitioner and Gutirrez arrived in a green 1965 Chrysler, stopped, sped away, and were apprehended with narcotics. The prosecutor's comment was merely a permissible inference drawn from the defendants' acts.

With respect to the comment by the prosecutor in his opening statement that the occupants of the Buick were addicts,[2] we point out that the comment was neither repeated nor referred to during the remainder of the trial. Thus, the court of appeals held, in light of the explicit charge to the jury that statements of lawyers are not evidence (Tr. 183–184) and a similar admonition in that regard by the prosecutor himself (Tr. 3), that the comment did not require a mistrial.

The cases cited in the petition (Pet. 8–13) as demonstrative of a conflict among the circuits are distinguishable, as the court of appeals held (Pet. App. 3–4; see Pet. 8). Each involved a comment or misconduct of obvious prejudicial character, *e.g.*, repeated references to an immaterial fact that a defendant on trial for possession of narcotics stored the drugs in a child's dresser drawer, thereby evincing a "reckless disregard of the welfare of chil-

[2] The prosecutor's other remark—that agent Coulter and another officer had long experience in the narcotics enforcement field—was unobjectionable. It was later supported by the testimony of the two men, to which no objection was made; indeed, a witness may always indicate his background and employment.

dren * * *."[3] It is evident, moreover, that each case in which it is asserted that an allegedly improper comment prejudiced the defendant must be judged by its particular circumstances. We think it clear that no issue warranting review by this Court is presented by the determination below that petitioner was not prejudiced by the comments here questioned.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1966.

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[3] *United States* v. *Bugros*, 304 F. 2d 177, 178 (C.A. 2). Petitioner also relies on *Towbin* v. *United States*, 93 F. 2d 861 (C.A. 10). But in that case the prejudicial quality of the prosecutor's misconduct was also manifest. The prosecutor on direct examination of narcotics agents solicited the information that the office of the defendant physician had been under surveillance, and that two named narcotics addicts, who had recently pleaded guilty, had frequented the doctor's office. That improper line of questioning obviously reflected upon the defense that the doctor had merely administered drugs lawfully to his *bona fide* patients.

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